SIDLEY

SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
+1 202 736 8000
+1 202 736 8711 FAX

AMERICA • ASIA PACIFIC • EUROPE

JYOUNG@SIDLEY.COM
+1 202 736 8677

December 4, 2017

REDACTED – FOR PUBLIC INSPECTION

By ECFS

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
455 12th Street, S.W.
Washington, DC 20054

Re: WC Docket No. 15-247; **Public** Version of the Comments on Remand of AT&T Services, Inc.

Dear Ms. Dortch:

Pursuant to the *Protective Orders* adopted by the Commission in WC Docket Nos. 16-143, 15-247, 05-25, and RM-10593,[1] AT&T Services, Inc. respectfully submits the enclosed **Public** version of its Comments on Remand in this proceeding. We are concurrently filing a Highly Confidential version of these Comments on Remand via hand delivery. Individuals who are admitted to the *Protective Orders* in these proceedings can request an unredacted copy of this document by contacting Marc Korman of Sidley Austin LLP (mkorman@sidley.com).

Respectfully submitted,

/s/ James P. Young
James P. Young

Enclosure

[1] *See* Order, *Business Data Services in an Internet Protocol Environment; Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (rel. Jun. 24, 2016) (collecting citations for the protective orders previously issued in these proceedings).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans	WC Docket No. 15-247

COMMENTS OF AT&T SERVICES, INC. ON REMAND

Keith M. Krom
Gary L. Phillips
David L. Lawson
AT&T Services, Inc.
1120 20th Street, NW
Suite 1000
Washington, DC 20016
(202) 463-4148

James P. Young
Christopher T. Shenk
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
(202) 736-8000
(202) 736-8711 (fax)

Dated: December 4, 2017

Counsel for AT&T Services, Inc.

TABLE OF CONTENTS

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans	)))))))	WC Docket No. 15-247

COMMENTS OF AT&T SERVICES, INC. ON REMAND

Pursuant to the Commission's Public Notice in the above-captioned docket, released November 3, 2017 ("Public Notice"), AT&T Services, Inc. ("AT&T") submits these comments addressing the issues on remand from the D.C. Circuit.

INTRODUCTION AND SUMMARY

AT&T agrees with the Commission's decision to take this voluntary remand to correct the fundamental errors of the *Tariff Order*.[1] As discussed below, the *Order* is irreconcilable with both (1) the D.C. Circuit's decision in *BellSouth Telecomms. Inc. v. FCC*, 469 F.3d 1052 (D.C. Cir. 2006), and (2) the economic realities of an expanding and intensely competitive market for business data services ("BDS"), in which the legacy DS1 services at issue will soon be obsolete.

The portion of the investigation related to AT&T focuses on four of AT&T's tariffed "portability" pricing plans that cover only DS1 services. The AT&T tariffs give customers three basic options for ordering DS1 circuits. *First*, a customer can order those lines on an undiscounted

[1] Tariff Investigation Order and Further NPRM, *Business Data Services in an Internet Protocol Environment et al.,* 31 FCC Rcd 4723, ¶¶ 86-158 (2016) ("*Tariff Order*"), *remanded sub nom. AT&T, Inc. v. FCC*, Nos. 16-1145, 16-1166, 16-1177 (D.C. Cir. Aug. 29, 2017).

month-to-month basis with no term commitment. *Second*, a customer can obtain a term discount for a particular circuit if it promises to keep that circuit for a period of years, subject to an early termination fee. *Third*, if a customer opts into such circuit-specific term discounts for multiple circuits, it may also—at its discretion—opt into one of the overlay "portability" plans that are the specific subject of this investigation. These portability plans are like insurance policies: they forgive the early termination fees a customer would otherwise pay if it breaches some of its circuit-specific term commitments. In exchange for that benefit, a buyer that opts into a portability plan agrees to pay a shortfall penalty if its *overall* DS1 purchases from AT&T fall below a prescribed level.

The *Tariff Order* found no fault with AT&T's baseline rates for these services or with the underlying term-discount plans, which many purchasers have chosen without any portability option. Instead, the Commission invalidated some of the overlay portability plans because, in its view, they are not accommodating enough to buyers who breach an unusually large percentage of their term commitments. That decision violates the core holding of *BellSouth*, which AT&T cited extensively but the *Tariff Order* ignored. In that case, the D.C. Circuit held that the Commission acts unreasonably when it invalidates, on grounds of unreasonable commitment requirements, an optional price-concession plan that the carrier "had no obligation to offer … at all." *BellSouth,* 469 F.3d at 1057. As the court explained, when such a plan is optional to customers as well as the carrier, "whatever problems" those customers might face in meeting a commitment requirement to which they agreed "are more appropriately attributed to their free choice than to the … commitment requirement." *Id.* at 1059.

That holding controls here because, as in *BellSouth*, the overlay portability plans are optional both for AT&T's customers and for AT&T itself. First, customers are free to—and many do—decline to participate in those plans. Indeed, customers accounting for about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of AT&T's declining DS1 revenue base ordered DS1 services either on a monthly basis or, more commonly, under basic term plans with no overlay portability provision—*i.e.*, no automatic forgiveness when they breach their term commitments. Second, it is undisputed that, under the carrier-initiated-rate doctrine, AT&T has no obligation to offer this overlay portability option at all. Finally, as in *BellSouth*, the Commission's invalidation of these plans led to a "headscratching outcome" (*id.* at 1057): constraining a carrier's ability to enforce the quid pro quo for optional price concessions will discourage carriers from offering such concessions in the first place, leaving some customers worse off *ex ante* and no customers better off.

2. In addition to its inconsistency with *BellSouth*, the *Tariff Order* also crashes headlong into the empirical record compiled by AT&T. The *Tariff Order* invalidated two basic aspects of certain portability plans—so-called "all-or-nothing" requirements and shortfall penalties exceeding "expectation value"—on the basis of an underlying concern that they present an unacceptable risk of "lock-in" (foreclosure) effects. In so ruling, the *Tariff Order* uncritically accepted the unsupported claims of some competitive providers that these portability plans present credible lock-in concerns, while ignoring the vast amount of actual evidence—hard data and economic testimony—submitted by AT&T demonstrating that there is no basis for those "lock-in" concerns.

Indeed, AT&T submitted extensive evidence and analysis showing that these plans do not and could not have such anticompetitive "lock-in" effects because they address only a small and declining portion of the available demand. Even at the time the original record was compiled, AT&T showed that the DS1 services in the four AT&T tariffed pricing plans at issue represented less than 10 percent of the total BDS marketplace in AT&T's in-region territory—leaving plenty of "addressable demand" for AT&T's competitors. AT&T also demonstrated that customers who chose the portability plans had substantial headroom before they would incur any penalties for migrating services to other providers or to other AT&T services if they desired, and that many customers had done so, resulting in precipitous declines in AT&T's DS1 revenues in recent years. AT&T likewise submitted an extensive economic analysis from Professor Carlton and others confirming the same conclusions. The *Tariff Order* ignored all of this market analysis and arbitrarily invalidated these portability plans on the basis of the very "lock in" theory that AT&T and Professor Carlton had discredited.

The subsequent real-world results of the *Tariff Order* vividly illustrate its deficiencies, and that it was ultimately a solution in search of a problem. The *Tariff Order* found that the "all-or-nothing" feature of the portability plans—*i.e.*, the requirement that the portability plan commitment be measured against the total number of DS1s the customer was purchasing from AT&T at the beginning of the portability plan's term—was the driver of the supposed "lock-ins." The Commission therefore pressured AT&T to file replacement tariffs that allow a customer to choose how many of its DS1s it will place in a portability plan subject to a percentage commitment. The result? Only *one* AT&T customer chose this new Commission-designed plan. The remaining customers chose to remain on AT&T's existing portability plans. Thus, after all of the CLEC complaining and a full Commission tariff investigation at their behest, almost all of the CLECs in the end voluntarily chose to stick with what they had—because AT&T's original plans, as designed, provide substantial benefits and leave plenty of room to move circuits to competitive alternatives.

For all of these reasons, the *Tariff Order* is both unlawful and contrary to the evidence. On remand, the Commission should give due consideration to that evidence, vacate the *Order*'s findings of unlawfulness, and dismiss the underlying complaints with prejudice.

BACKGROUND

In its Direct Answer, Reply, and other submissions, AT&T comprehensively analyzed the regulatory issues raised in the *Designation Order*. This supplemental submission does not repeat that analysis in detail; instead, it briefly summarizes the applicable regulatory regime and the proceedings to date.

A. The Regulatory Framework for Business Data Services

The AT&T pricing plans at issue here govern the provision of a single service: legacy TDM DS1s.[2] DS1s are typically offered over copper wires and use a legacy multiplexing technology—time division multiplexing ("TDM")—originally developed for the voice telephone networks of the 1960s. As the Commission has found, DSn services are in precipitous and irreversible decline, because customers have been steadily switching to advanced packet-switched alternatives such as Ethernet.[3] AT&T has submitted unrebutted evidence into the record confirming that demand for its DS1 services in particular has fallen dramatically in recent years as customers replace them with modern Ethernet-based alternatives. *E.g.*, Brief of AT&T Inc. in Support of its Direct Case, *Investigation of Certain Price Cap Local Exchange Carrier Business*

---

[2] The *Tariff Order* also addresses DS3 services offered under other companies' tariffs, but the AT&T tariffs at issue involved only DS1 services. The analysis below, however, applies equally to DS1 and DS3 services (collectively, "DSn services").

[3] Report & Order, *Business Data Services in an Internet Protocol Environment,* 32 FCC Rcd. 3459, ¶ 69 (2017) ("*BDS Order*") (quantifying the major loss of DSn business for AT&T and other ILECs between 2013 and 2015, and noting that "the rate of loss is accelerating"); *see also id.* ¶¶ 3, 25, 229.

Data Services Tariff Pricing Plans, WC Docket No. 15-247, at 3, 10-11 (filed Jan. 8, 2016) ("AT&T Direct Case"). And the Commission has recently concluded that ILECs enjoy no special advantages in the Ethernet marketplace, which is intensely and increasingly competitive. *See BDS Order* ¶ 83 (ILECs are "on similar footing to entrants").[4]

The *BDS Order* released earlier this year permits ILECs to detariff their competitive BDS offerings on a permissive basis until 2020, at which time all BDS will be mandatorily detariffed.[5] In the meantime, DS1 services are subject to traditional tariff regulation under Sections 203-205 of the Communications Act of 1934, 47 U.S.C. §§ 203-205, after which time, non-competitive services will continue to be sold via tariff. Under Section 203, each carrier drafts its own tariffs and formulates rates in the first instance, which the Commission then approves or disapproves. *See AT&T Co. v. FCC*, 487 F.2d 865, 873-80 (2d Cir. 1973) (describing "carrier initiated rate" doctrine). Once a tariff is filed, the specified terms and conditions take effect unless the Commission takes specific steps under Sections 204 and 205 to find them unjust and unreasonable.

B. AT&T's Term-Discount and Portability Options

Present-day AT&T is the product of corporate mergers over the past two decades. It is now the parent to several regional operating companies ("AT&T ILECs") that were unaffiliated during most of the late 20th century: Pacific Bell ("PacBell"), Southwestern Bell, BellSouth, and Ameritech. The DS1 tariffs at issue here, filed between the early 1990s and the early 2000s, reflect

---

[4] *See* Mem. Op. & Order, *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, 22 FCC Rcd 18,705, ¶ 23 (2007) (market for Ethernet-based services is "highly competitive"), *aff'd*, *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009).

[5] *BDS Order* ¶¶ 160-70.

that corporate history. They differ from one another in various details because the carriers that filed them were, at the time, independent companies that did not coordinate their terms of service.[6]

Despite those differences in detail, each AT&T ILEC offers customers three basic ways to purchase DS1 services. *First*, customers can purchase circuits on a non-discounted month-to-month basis. *Second*, customers can opt into circuit-specific term discounts by committing to buy designated circuits for a defined period (often three years), subject to early termination fees if the circuit is canceled prematurely. Such term discounts, backed up by early termination fees, are ubiquitous in this industry, and for good reason. They benefit buyers by reducing the prices they pay, and they benefit sellers by increasing business certainty and reducing costly churn (repeatedly connecting and disconnecting circuits). In the *Tariff Order*, the Commission found no fault with any aspect of AT&T's term discount plans—not the length of the available terms, not the magnitude of the available discounts, and not the size of the early termination fees. *See* note 13, *infra* (noting distinction between "early termination fees" and "shortfall penalties").

Third, as a kind of "insurance policy" against early termination fees, a customer that participates in term plans may separately opt into an overlay "portability" plan that entitles it, within limits, to breach its underlying term commitments with impunity. AT&T created portability plans at the request of its customers, who "asked for a tariffed option that would provide them greater flexibility[.]" Declaration of Paul Reid, attached as Attachment 1 to AT&T Direct Case, ¶ 8 ("Reid Decl."). These overlay portability plans presuppose that the customer has already made a commitment—a term commitment—for the circuits it has chosen to purchase. Recognizing that a CLEC may want increased flexibility to cancel and move DS1 circuits as it responds to

[6] There is one exception: the PacBell and Southwestern Bell tariffs are identical in relevant part because those companies were affiliated in 2003, when the tariffs were filed.

competition and manages its retail customer base, the portability plans enable the CLEC to *escape* these term commitments, and avoid the early termination liabilities, for an established percentage of the CLEC's existing circuits. The quid pro quo for this increased flexibility is an assurance, enforced through potential shortfall penalties, that the term plans in the portability plan will be honored with respect to a minimum "commitment level." *Id.* ¶¶ 12-15. These portability plans have no effect on the underlying term discounts.

Notably, the portability plans' commitment levels have no exclusivity element: *i.e.*, they do not require participating customers to assign any particular percentage of their overall purchases to AT&T, as opposed to other providers. Instead, they constrain how much a participating customer may reduce its DS1 purchases from AT&T in relation to how many circuits it purchased *from AT&T* when it opted into the portability plan. For example, PacBell and Southwestern Bell require a customer to maintain at least 80% of the number of last-mile DS1 circuits it purchased from AT&T just before entering the plan, whereas Ameritech requires a customer to maintain at least 90% of such circuits, although Ameritech allows customers to lower that commitment by moving circuits to other plans. *Id.* ¶¶ 13-14.

It is important to underscore that AT&T provides at its own cost a number of important and economically valuable benefits to its customers that opt into a portability plan. AT&T agrees to forgo the early termination liability on a potentially large number of circuits, even as it allows the customer to enjoy the lower rates associated with longer-term plans without actually honoring the full term commitment or paying the early termination liability. When a term-discount plan is terminated early, AT&T loses the revenues for those facilities, and even if AT&T finds a replacement buyer, AT&T must incur the substantial costs of contracting and installing the circuit for a different entity.[7] And, because the commitment levels are calculated on a region-wide basis, the customer gains broad freedom to shift circuits around within its customer base without penalty and to target entry to particular localities.[8]

These plans thus shift a substantial portion of the risks and costs associated with prematurely disconnected circuits from the customer to AT&T. In exchange for bearing those increased risks and costs, the plans include potential shortfall liabilities, both to establish a reasonable outer boundary on the uncompensated costs AT&T will potentially bear, and to act as a contract enforcement mechanism with regard to the new, rebalanced bargain. The minimum commitment levels are set low enough to give the customer plenty of flexibility to manage a natural level of churn in its base of circuits without incurring ETLs, but not so low as to upset the overall balance of AT&T's special access rate structure. But even if a customer cancels enough circuits to trigger the shortfall liability, the customer still receives the full term discounts on all of its remaining circuits subject to the term plans.

Over the history of these portability plans, customers typically have not incurred shortfall penalties, and when they do, the penalties have tended to be very small relative to the customer's overall purchases.[9] Indeed, AT&T's experience has been that customers tend to choose these portability plans only when they suit their needs; otherwise, they use one of AT&T's many other

---

[7] Reid Decl. ¶ 10.

[8] Declaration of Dennis Carlton, Mark Israel, Allan Shampine, & Hal Sider, attached as Attachment 3 to AT&T Direct Case, ¶¶ 49-50 ("Carlton-Israel-Shampine-Sider Decl.").

[9] *See* AT&T Direct Case, Attachment 4.A, Table 6; Reply Brief of AT&T Inc. in Support of its Direct Case, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans,* WC Docket No. 15-247, at 19-20 (filed Feb. 26, 2016).

options, such as the pure term discount plans, Ethernet services, or other pricing flexibility contracts, none of which are at issue here.[10]

The distinction between the underlying term-discount option and the overlay portability option is important but sometimes obscured by the different tariffs' nomenclature. An AT&T carrier might offer a pure term-discount plan and a formally separate term-plus-portability plan, each with a different name and described in a separate tariff provision.[11] In substance, however, a customer doing business with any AT&T carrier chooses (1) whether to order a term discount in the first place, and, if so, (2) whether to buy an insurance policy (portability) against the early termination fees associated with the term discount. And the customer can reject the portability option and still receive the same (or, under the Ameritech tariff, slightly greater) term discounts as if it had elected the portability option. This is not merely theoretical: customers that do not participate in any portability plan account for about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent of AT&T's DS1 revenues. *See* AT&T Direct Case at 34, 40.

---

[10] As AT&T previously noted, some of the most prominent CLECs that agitated for this proceeding did not even take service under the "percentage commitment" plans, and the ones that do have substantial headroom to shift circuits to other providers without penalty. AT&T Direct Case at 20.

[11] Ameritech offers a term discount plan (the "Optional Payment Plan" or "OPP") and a term-plus-portability plan (the "Discount Commitment Program" or "DCP") with slightly smaller discounts. BellSouth offers a base discount plan (the "Channel Services Payment Plan" or "CSPP") and a tariff-plus-portability plan (the "Area Commitment Plan" or "ACP") with the same term-based discounts and structure as the CSPP. PacBell and Southwestern Bell each offer a unified Term Payment Plan ("TPP"), which provides term discounts and an optional portability component. *See* Reid Decl. ¶¶ 12-15.

C. The *Designation Order* and the Parties' Positions

On October 16, 2015, the Commission issued its *Designation Order*,[12] opening an investigation under Section 205(a) into whether certain carrier discount mechanisms violate Sections 201 and 202 of the Communications Act. The Commission launched the proceeding at the behest of various competitive local exchange carriers ("CLECs"), which purchase ILEC services as inputs for the retail services that they sell in competition with ILECs. The *Designation Order* made clear that this proceeding would be an investigation of the CLECs' long-held "lock-in" theory. Under the "lock-in" theory, the CLECs claimed they have "no choice" but to take service under AT&T's four DS1 portability plan tariffs because of AT&T's "overwhelming control of the special access marketplace." They complained most about "percentage commitments" in such plans, under which a purchaser agrees to maintain "a percentage of [its] prior or existing (at point of signing) purchases with the incumbent LEC." *Id.* ¶¶ 12, 30. According to the CLECs, AT&T's pricing plans that contain such "percentage commitments" have "locked up" so much of the available business that competitors do not have sufficient "addressable demand" to invest in alternative networks and CLECs cannot otherwise shift their purchases to other providers. *Id.* ¶ 31.

The Commission launched this proceeding to determine whether these "percentage commitments" in fact have those alleged lock-in effects. In its *Designation Order*, the Commission cited "antitrust precedent" and "economic literature" showing that, under particular market conditions, contractual commitments can lock in so much demand that they foreclose effective competition. *Id.* ¶ 19. To determine whether percentage commitments raise such

[12] Order Initiating Investigation and Designating Issues for Investigation, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247 (rel. Oct. 16, 2015) ("*Designation Order*").

foreclosure concerns here, the *Designation Order* directed AT&T and other ILEC parent companies to provide data and analysis concerning the market effects of percentage commitments and associated shortfall penalties. *See id.* ¶¶ 38-60.

In response to the *Designation Order*, AT&T explained that the competitors' "lock-in" allegations are untethered to market realities and economic theory. Consistent with the Commission's later findings in the *BDS Order* (*e.g.*, ¶ 69), AT&T observed that customers are rapidly abandoning legacy DS1 services in favor of modern Ethernet alternatives; that AT&T had lost a large percentage of its DS1 business over the previous two years alone; and that the DS1 services covered by the AT&T tariffs at issue now "represent well below 10 percent of the total [business data service] marketplace in AT&T's in-region territory." AT&T Direct Case at 3. As AT&T explained, "[t]he mass exodus of customers from AT&T's DS1 services over the past two years demonstrates, not that customers are 'locked into' these services, but … that they have other options in the marketplace and that they are free to exercise those options." *Id.*

AT&T further explained that its tariffs offer only circuit-specific *term* discounts, not multi-circuit *volume* discounts, and thus require no percentage or volume commitment in exchange for any discounts. Instead, customers encounter "percentage commitments" only if they opt into overlay portability plans, which allow customers to avoid early termination fees in exchange for the customers' commitment to maintain a minimum overall level of DS1 purchases. *Id.* at 4. To address the economic effects of those percentage commitments, AT&T submitted a detailed empirical analysis by University of Chicago Professor Dennis Carlton and several other economists. As that analysis explained, the percentage commitments in these portability plans raise no plausible concern about market foreclosure ("lock-in") because, among other considerations, they leave substantial "demand available to rivals that is unencumbered by contractual restrictions related to portability." Carlton-Israel-Shampine-Sider Decl. ¶ 57.

AT&T further explained that all aspects of its portability plans, including the provisions relating to percentage commitments and shortfall penalties, are necessarily lawful under the D.C. Circuit's *BellSouth* decision. *E.g.*, AT&T Direct Case at 5, 29-30. In that case, the court found that an incumbent carrier could not be faulted for offering an optional discount plan with percentage commitments where it has "no obligation to offer a … discount plan at all." *BellSouth*, 469 F.3d at 1057. Instead, customers exercise "free choice" if they choose the discount plan, which is properly structured "as a bargain containing terms that both benefit and burden its subscribers." *Id.* at 1059-60. AT&T explained that the lawfulness of its portability plans follows *a fortiori* from *BellSouth* because here, unlike there, the discount plans themselves contain no percentage commitment; only the overlay portability option does. Customers wishing to avoid a percentage commitment can do so while still purchasing circuits at the discounted rates. Instead, they can opt into a term-discount plan with no portability overlay, as many customers have done. *See* AT&T Direct Case at 34, 40.

D. The Tariff Order

The Commission issued the *Tariff Order* on May 2, 2016. The *Order* upheld AT&T's underlying term-discount provisions, including the early termination fees assessed for breach of any term commitments.[13] It nonetheless invalidated three of AT&T's four portability plans and directed AT&T to file amended tariffs.

---

[13] Although the *Tariff Order* loosely used the term "early termination fees" to describe invalidated provisions of the PacBell and Southwestern Bell tariffs, *see Tariff Order* ¶¶ 146, 150, those provisions relate instead to buy-down options applicable only to customers that have opted into *portability plans* and wish to avoid shortfall penalties. *See id.* ¶ 146. They are distinct from the

First, the *Tariff Order* invalidated the Ameritech, PacBell, and Southwestern Bell portability plans because, in exchange for avoidance of early termination fees when a customer violates its underlying term commitments, the customer must agree to a minimum commitment level defined as a percentage of all DS1 purchases from AT&T at the inception of the portability plan's term.[14] The *Order* condemned that feature—which it called an "all-or-nothing" requirement—on the ground that it "'lock[s] up' all of a customer's purchases, limiting its ability to minimize the amount of its purchases subject to high percentage and longer term commitments and restricting its ability to migrate its purchases to alternative providers or to self-provision using its own facilities." *Id.* ¶ 95. In so ruling, the *Order* did not cite either *BellSouth* or Professor Carlton's rejection of the foreclosure/lock-in theory on which the Commission relied.

Second, the *Tariff Order* invalidated the financial liabilities associated with breach of the PacBell and Southwestern Bell portability plans. A customer whose purchases fall below the minimum commitment level under that plan is subject to a shortfall penalty based on the amount of time left in the portability plan and the number of shortfall circuits multiplied by certain non-recurring charges. Reid Decl., Exh. A, at 9. Alternatively, under the more likely scenario, the customer may "buy down" its commitment level by paying an amount equal to the number of shortfall circuits times the month-to-month nondiscounted rate for the remainder of the relevant terms. *Id.* The *Tariff Order* found both options unreasonable on the ground that the required payments exceeded the carrier's "expectation value"—*i.e.*, "the amount the purchaser would have

---

early termination fees AT&T assesses for violation of the underlying term commitments, which the *Tariff Order* indeed cited as models of reasonableness. *See id.* ¶ 145.

[14] *Tariff Order* ¶ 96 (AT&T plans "requir[e] customers to commit all of the customer's relevant type of in-service circuits . . . at the inception of a portability plan or option," which means customers are "unable to choose to keep [a portion of] their purchases out of the initial commitment associated with the portability plan").

paid had it met its minimum commitment level. . . ." *Tariff Order* ¶ 115 (discussing shortfall penalties); *see id.* ¶ 148-50 (discussing buy-down option).[15] Here, too, the *Order* condemned any liabilities exceeding expectation value on foreclosure grounds, finding that such penalties "have the effect of locking competitive [providers] into purchasing [DS1] business data services from incumbent [carriers]." *Id.* ¶ 117. And here, too, the *Order* cited neither *BellSouth* nor Professor Carlton's analysis.

In sum, of the four AT&T portability plans at issue, the *Tariff Order* invalidated three of them on "all-or-nothing" grounds (PacBell, Southwestern Bell, and Ameritech) and two of those on additional grounds of excessive shortfall/buy-down remedies (PacBell and Southwestern Bell). The *Tariff Order* left intact BellSouth's portability plan (which has nothing to do with the much different volume-discount plan at issue in the *BellSouth* case). The BellSouth tariff prescribes generally lower shortfall penalties than the PacBell and Southwestern Bell tariffs do, and—of particular significance here—uses a different methodology than the others to define its commitment level. With certain exceptions discussed below, each of the other plans requires participants to maintain a certain percentage (either 80% or 90%) of their *overall* DS1 purchases from AT&T at the time they enter the plan. In contrast, the BellSouth tariff bases the commitment level more narrowly on the number of circuits each customer chooses to place in the portability plan, but it requires customers to maintain at least 100% of that customer-chosen level. Reid Decl. ¶¶ 15, 12 n.6.

---

[15] The calculation of "expectation value" is complex, and the *Tariff Order* indicated that the Commission would construe the concept narrowly. *See Tariff Order* ¶ 139 (suggesting that, in calculating that concept, the Commission would exclude complementary services customarily ordered with services purchased under term plans).

In July, 2016, AT&T filed new tariffs that comply with the *Order* by amending the Ameritech, PacBell, and Southwestern Bell portability plans to reflect the same basic methodology used in the BellSouth tariff to set commitment levels. AT&T also lowered the shortfall penalties prescribed in the PacBell and Southwestern Bell portability plans.

E. AT&T's Appeal and the Voluntary Remand.

AT&T filed petitions for review in the D.C. Circuit in May 2016. On June 13, 2017, the Commission moved for a voluntary remand on the ground, among others, that the *Tariff Order* had ignored *BellSouth*, which AT&T's initial submissions to the D.C. Circuit had identified as a central basis for challenging the *Order*. On August 29, 2017, the D.C. Circuit granted the motion for voluntary remand. On November 3, the Commission issued the Public Notice asking the parties to "address issues that will permit the Commission 'to consider the extent to which the reasoning in the *Order* is compatible with the BellSouth decision . . . or to otherwise reconsider its determination' that the tariff provisions in question were unlawful."[16]

ARGUMENT

I. THE *TARIFF ORDER* CONTRADICTS THE D.C. CIRCUIT'S HOLDING IN BELLSOUTH

Two undisputed points frame this proceeding. *First*, AT&T's customers could, and many did, buy DS1 services without opting into the portability plans deemed unlawful in the *Tariff Order*. AT&T offered three basic choices for purchasing DS1 services under tariff: (1) undiscounted month-to-month rates; (2) basic term plans that offer substantial discounts without percentage commitments; and (3) term-plus-portability arrangements that offer insurance against early termination fees but are accompanied by percentage commitments. The Commission has

[16] Public Notice, *Wireline Competition Bureau Seeks Comment in Connection with Court Remand of Tariff Investigation Order,* WC Docket No. 15-247 (Nov. 3, 2017).

found no fault with any aspect of options 1 and 2. Indeed, those options are just and reasonable not only as a matter of law, but also as a matter of market reality: customers accounting for about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of AT&T's shrinking DS1 revenue base have ordered DS1 circuits under options 1 and 2 without opting into any portability plan. *See* AT&T Direct Case at 34, 40.

Second, AT&T had no obligation to offer any portability option to begin with. Under the "carrier-initiated rate" doctrine imposed by the Communications Act, a carrier—not the Commission—formulates the terms and conditions of its tariffed service in the first instance, and the Commission's substantive role is either to approve the tariff or to invalidate it. *See* 47 U.S.C. §§ 203-205; *MCI Telecomms. Corp. v. FCC*, 561 F.2d 365, 374 (D.C. Cir. 1977); *AT&T Co.*, 487 F.2d at 873-80. Only in rare cases, under procedures specified in 47 U.S.C. § 205, may the Commission compel a carrier to provide service on terms of the Commission's own choosing. The Commission has not invoked that affirmative rate-prescription mechanism here.[17] Indeed, it has never even directed AT&T to offer term discounts (option 2), let alone term discounts accompanied by additional price concessions in the form of conditional breach forgiveness (option 3).

The question here, then, is whether the Commission may invalidate an optional price-concession plan because some purchasers have complained about its quid-pro-quo conditions, even though the carrier need not have offered the plan in the first place and the complaining

[17] Section 205 provides that "[w]henever, after full opportunity for hearing," the Commission decides that a tariff provision is unlawful, it may direct the carrier to "cease and desist from such violation" and, where appropriate, may "prescribe … the just and reasonable charge" for a service. 47 U.S.C. § 205(a). Here, the Commission asserted its Section 205 authority to invalidate tariff provisions that it found unlawful but not to prescribe compulsory terms of service. *See Tariff Order* ¶ 88.

purchasers need never have opted into it. As AT&T has emphasized from the beginning of this investigation, the D.C. Circuit's *BellSouth* decision answers that question in the negative and thus precludes any challenge to these optional portability plans. *See* AT&T Direct Case at 5, 29-30; *see also* AT&T Reply at 5, 18, 39.

The optional tariff plan at issue in *BellSouth*, much like the optional portability plans here, offered price concessions for business data services accompanied by percentage commitments. *See BellSouth,* 469 F.3d at 1054-55. Specifically, the plan in *BellSouth* offered volume discounts in exchange for a customer's commitment, backed up by "the risk of shortfall penalties," to "purchase each year no less than 90% of what [the customer] purchased on an annualized basis in the six months preceding [its] subscription to the plan." *Id.* at 1055. The size of the discounts increased with purchase volume, but so did the commitment level. The Commission invalidated the tariff because the discounts did not rise linearly with volume, *id.* at 1057, and independently because the 90% commitment level, combined with the threat of shortfall penalties, "'diminish[ed] flexibility'" in the purchasing options of certain customers, *id.* at 1059. In both respects, the Commission found that the tariff unreasonably discriminated against those customers in favor of BellSouth's long-distance affiliate, which purchased from the same tariff.[18]

The D.C. Circuit vacated the Commission's order on broad grounds that are equally applicable here. As it explained, BellSouth "had no obligation to offer a volume discount plan at all," much less a discount plan with greater benefits or less demanding commitments in return. *Id.* at 1057. Likewise, BellSouth's customers had no obligation to opt into the voluntary commitments

[18] The Commission invalidated the plan under Section 272 of the Communications Act, 47 U.S.C. § 272, which prohibits a Bell company from discriminating between its long-distance affiliate and unaffiliated carriers, rather than Sections 201 and 202, which prohibit unjust and unreasonable practices in general, including unreasonable discrimination. That statutory distinction is immaterial to the Court's reasoning in *BellSouth*.

that, as they later complained, left them with insufficient "headroom"—*i.e.*, "the margin between a company's committed volume level and its actual purchases. . . ." *Id.* at 1059. As the court explained, "whatever problems [those customers] might have experienced due to their lack of headroom are more appropriately attributed to their free choice than to the 90% commitment requirement." *Id.* Overall, the court observed, a discount plan "is most naturally viewed as a bargain containing terms that both benefit and burden its subscribers." *Id.* at 1060. So long as that bargain is optional for both sellers and buyers, the Commission cannot properly invalidate it because it would have preferred that the carrier file some other tariff specifying a different optional bargain with a different mix of benefits and burdens.

The same logic applies here. Like BellSouth, AT&T "had no obligation to offer a … discount plan at all. . . ." *Id.* at 1057. Of course, AT&T *did* offer—and many customers opted for—basic term-discount plans unaccompanied by any percentage obligation. That option gave AT&T's customers an extra set of choices beyond the undiscounted month-to-month rates. But just as AT&T "had no obligation to offer" these term-discount plans, *id.*, it also "had no obligation to offer," in addition to those plans, an overlay portability option that offered breach forgiveness on the underlying term plans. Once customers chose that portability option, they could not reasonably complain to the Commission that the percentage commitments they voluntarily undertook caused them "headroom" problems. *Id.* at 1059. As it turned out, few if any subscribers to the relevant portability plans encountered any headroom problems in the first place, and the Commission's failure to address that fact is an additional basis for invalidating the *Order*. *See* Section II, *infra.* But our main point here is that, in the D.C. Circuit's words, "whatever problems [AT&T's customers] might have experienced due to their lack of headroom are more appropriately attributed to their free choice than to the [percentage] commitment requirement[s]." *BellSouth*, 469 F.3d at 1059.

Finally, as in *BellSouth*, the Commission's invalidation of an optional price-concession plan leads to a most "headscratching outcome" (*id.* at 1057). The *Tariff Order*, in effect, creates a new legal regime under which an ILEC retains discretion to offer or withhold optional price-concession plans but confronts major restrictions on its ability to enforce purchase commitments as a quid pro quo for those price concessions. Those restrictions obviously give ILECs disincentives to continue offering such plans in the first place. Viewed *ex ante*, therefore, this new regime leaves some customers worse off and none better off if—as it is free to do—the ILEC responds by withdrawing such plans. For example, the Commission has never directed any ILEC to offer a portability plan against its will, and the carrier-initiated rate doctrine would generally forbid it to do so. Thus, any ILEC faced with invalidation of an optional portability plan could simply decline to replace that plan with a new one, leaving customers with a narrower choice between undiscounted rates and basic term-discount plans with no portability option. Under that scenario, invalidation of an optional plan succeeds only in removing an option from every customer's menu of choices, to no one's benefit and to the detriment of any customers that would otherwise choose that option.

Of course, this set of issues would assume a different posture had Congress given the Commission command-and-control authority to specify terms of service in the first instance and direct carriers to offer a diverse menu of Commission-prescribed rate plans for each of their services. But Congress instead adopted the carrier-initiated rate doctrine embodied in Sections 203-205 of the Communications Act, entitling carriers to formulate their own rate plans, subject to a highly circumscribed review role by the Commission. And "[t]here is no regulatory authority granted to the Commission by virtue of its power to regulate the communications … industr[y] which permits it to circumvent the statutory plan of carrier initiated rate[s],” as set forth in the “careful accommodation of [public and private] interests upon which the regulatory scheme was based.” *AT&T Co.*, 487 F.2d at 873, 875.

II. THE *TARIFF ORDER* RESTS ON UNSUBSTANTIATED AND COMPREHENSIVELY REBUTTED “LOCK-IN” CONCERNS

Quite apart from its inconsistency with *BellSouth*, the Commission should rescind the *Tariff Order* because the “foreclosure”/“lock-in” concern on which it rested is empirically baseless, and its focus on the so-called “all-or-nothing” feature of certain AT&T tariffs is incoherent and arbitrary.

As discussed, the *Tariff Order* invalidated AT&T’s portability plans on the grounds that aspects of their percentage commitments and associated shortfall penalties “have the effect of locking competitive [providers] into purchasing [DS1] business data services from incumbent LECs, preventing them from moving to competitors or growing their own networks when it would be efficient to do so” and “imped[ing] technology transitions” from DS1 services to modern Ethernet-based alternatives. *Tariff Order* ¶ 117.[19] The *Tariff Order* relied on this “lock-in”

[19] The *Tariff Order* and the complaining CLECs use the terms “lock in,” “lock up,” and “foreclose” interchangeably. *See*, *e.g.*, *Tariff Order* ¶ 465 (“Competitive LECs claim that such commitments tend to ‘lock up’ or foreclose significant portions of the market for TDM based business data services, impairing competition[.]”); Opposition of Joint CLECs, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247, at 64 (filed Feb. 5, 2016) (“Joint CLEC Opp.”) (“if incumbent LEC contracts lock up sufficient customer demand for wholesale services, the resulting ‘customer foreclosure’ can discourage competitive LEC entry”). The CLECs typically do not allege, and the Commission has not found, that the plans at issue foreclose competition for *retail* customers. Instead, the CLECs allege that these plans foreclose *wholesale* competition—*i.e.*, that they keep CLECs from building out additional facilities, from using those facilities (rather than the ILECs’ facilities) as inputs for their services, and from using those facilities to compete more effectively for sales to other wholesale providers. *See* Joint CLEC Opp. at 3.

(foreclosure) theory as its overarching concern when it invalidated both the "all-or-nothing" features of these tariffs and the size of the shortfall liabilities. *See id.* (shortfall penalties); *id.* ¶¶ 95-96 (all-or-nothing plans). For years, CLECs have invoked this foreclosure theory in asking the Commission to grant them various regulatory advantages when they buy ILEC services as inputs for their own retail services, which they typically offer in competition with the ILECs' retail services. Here, as in other such contexts, the evidence tells a different story: these "lock-in"/"foreclosure" allegations are fictitious.

When it launched this proceeding, the Commission framed the issues in terms of a foreclosure theory familiar from "antitrust precedent" and "economic literature."[20] This foreclosure theory holds that, *under certain market conditions*, discounts accompanied by contractual commitments can lock in so much demand in a given market that they foreclose effective competition within that market. Consistent with both antitrust and Communications Act precedent, the *Designation Order* added that "the ultimate question is not whether a particular competitive LEC is harmed but whether there is harm to competition," in the form of economic inefficiency and thus harm to consumers. *Designation Order* ¶ 20 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962)).[21]

---

[20] *Designation Order* ¶ 19 & n.53 (citing, *inter alia*, *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012); *United States v. Dentsply Int'l Inc.*, 399 F.3d 181 (3d Cir. 2005); *United States v. Microsoft Corp.*, 253 F.2d 34 (D.C. Cir. 2001) (en banc); and Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1802e (2d ed. 2002)).

[21] *See also SBC Commc'ns Inc. v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995) ("The Commission is not at liberty … to subordinate the public interest to the interest of 'equalizing competition among competitors.'") (quoting *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir.1974); *see also W. Union Tel. Co. v. FCC*, 665 F.2d 1112, 1122 (D.C. Cir. 1981) ("equalization of competition is not itself a sufficient basis for Commission action").

AT&T responded with an extensive data and analysis showing why this market is *not* susceptible to any anticompetitive foreclosure phenomenon. As AT&T explained, "all of th[e] foreclosure models" cited in the *Designation Order* "require as a basic premise that a sufficiently large amount of demand be locked up thereby leaving insufficient demand for rivals" to compete for, with ensuing harms to competition. AT&T Direct Case at 6 (internal quotation marks omitted). AT&T showed that this "premise cannot be met here because the AT&T [portability] tariffs at issue leave a large amount of demand available to rivals that is unencumbered by contractual restrictions related to portability." *Id.* (internal quotation marks omitted).

Indeed, AT&T explained, the challenged portability plans "represent a small and declining portion of the available demand" and thus "could not materially affect the 'addressable' market for entry and investment." AT&T Direct Case at 34. As AT&T showed, the AT&T pricing plans at issue accounted for well below 10 percent of the total special access marketplace in AT&T's in-region territory. The *Designation Order*'s own estimate was that, according to the 2013 data collection, TDM-based services comprised about 60 percent of special access revenues as of the end of 2013, with non-ILECs accounting for more than 33 percent of those revenues. The TDM services sold by ILECs, therefore, would have accounted for only about 40 percent of the special access marketplace even in 2013. The DS1 services at issue here, however, account for only about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of AT&T's total TDM-based revenues, and the tariff pricing plans under investigation account for only about **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** of AT&T's non-affiliate DS1 sales – which means that the portion of BDS revenues subject to this investigation represented at most about 10 percent of the total available BDS revenues in the marketplace. AT&T Direct Case at 3; Reid Decl. ¶ 21 & n.5. And even that 10 percent figure would have been significantly inflated, because it was based on the 2013 data, which do not account for the dramatic shift from TDM-based services to Ethernet services over the ensuing years. In short, the vast and growing majority of AT&T's sales of BDS are *not* purchased under the tariff pricing plans under investigation in this proceeding. Accordingly, as a threshold matter, the four AT&T tariffs at issue simply do not account for enough of the available demand in the marketplace to allow a lock-in/foreclosure strategy.

The lock-in/foreclosure premise is also refuted by the overwhelming evidence that customers are in fact engaged in a rapid and ongoing shift of their business away from the DS1 services at issue to alternatives such as Ethernet. As AT&T showed, "AT&T's DS1 revenues … dropped by more than **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** percent" in the three years immediately preceding the comment period. AT&T Direct Case at 14. That fact alone refutes CLEC foreclosure arguments: there is no way the Commission could conclude that CLECs are locked into the purchase of a service that is being displaced at that pace. AT&T also demonstrated that "[t]he customers that do take service under these [portability] plans tend to have a large amount of 'headroom' available, which confirms that they are not significantly constrained by the AT&T pricing plans under investigation here." *Id.* at 21. Indeed, the "average headroom for all subscribers to AT&T's portability plans in the Southwestern Bell, Pacific Bell, and Ameritech regions ranged from about 10 percent to 27 percent. . . ." *Id.* at 21-22 (citing Reid Decl. ¶ 22, Table 1).[22]

[22] AT&T further refuted the suggestion that DS1 services are so competitively important in some areas that AT&T could leverage its supposed market power for DS1 services in those areas to foreclose competition for business data services in general. As AT&T explained, that theory "is specious because competition is most robust in those areas that account for the lion's share of [business data service] demand. The leveraging theory thus assumes that the tail can wag the dog." AT&T Direct Case at 8.

To substantiate and quantify all of these points, AT&T submitted an exhaustive economic analysis of market conditions by Professor Carlton and three other economists. The analysis confirmed, among other things, that the lock-in concern at the heart of this investigation was "not credible in light of (i) the relatively small volumes that are even conceivably 'locked up' by the portability options at issue, and (ii) the relatively large volumes of AT&T sales that can be diverted to rivals without generating early termination or shortfall liabilities." Carlton-Israel-Shampine-Sider Decl. at 6 (emphasis omitted). Professor Carlton and his coauthors further observed that any lock-in theory ignores the competitive facts on the ground, including "[t]he widespread entry and expansion of [competitive providers] in recent years." *Id.* at 7 (emphasis omitted). In sum, they concluded, "[m]arketplace evidence and economic theory refute the claim that the AT&T tariffed pricing plans under investigation harm competition by foreclosing rival[s]," and "[t]here is no competitive rationale for regulators to dictate the terms and conditions of these offerings." *Id.* at 5.

The *Tariff Order* ignored all of these points. Indeed, it never even cited Professor Carlton's analysis, even though the *Order* uncritically accepted, as its core premise, the precise lock-in/foreclosure theory that Professor Carlton had comprehensively discredited. Nor did the *Order* explain in substance how invalidation of these portability plans on lock-in grounds comported with the market facts that Professor Carlton and AT&T had identified. Similarly, the *Order* did not cite the foreclosure precedent or economic literature on which the *Designation Order* relied as the basis for lock-in concerns in the first place. Nor did the *Order* acknowledge the legal principle, emphasized in the *Designation Order*, that "the ultimate question is not whether a particular competitive LEC is harmed but whether there is harm to competition" in the broader economic sense. *Designation Order* ¶ 20. For that matter, the *Tariff Order* did not even make any fact-based findings that these portability plans disadvantage any substantial number of "particular competit[ors]" (*id*). In summarizing the parties' arguments, the *Order* noted AT&T's point that its actual "customers have 'headroom' under its plans that 'permits substantial demand to be moved to AT&T's rivals without penalty.'" *Tariff Order* ¶ 128. But it simply ignored that point when concluding that these portability plans should be invalidated on the ground that they do *not* permit sufficient demand to be moved to AT&T's rivals.

Had it considered these facts, and taken them seriously, the *Tariff Order* would have found that AT&T and Professor Carlton *et al.* were correct: there is no empirical predicate for any "foreclosure" or "lock-in" concern. It should make that finding now.

Finally, the Commission should disavow, as conceptually incoherent, the *Tariff Order's* categorical denunciation of so-called "all or nothing" portability plans, a label it attached to AT&T ILEC tariffs in the Ameritech and PacBell/Southwestern Bell regions. *Id.* ¶¶ 95-96. As an initial matter, the *Tariff Order*'s use of that terminology is confusing because AT&T customers can and often do select term discount plans for some circuits and not others, and no one has suggested otherwise.[23] The *Tariff Order* nonetheless characterized the overlay *portability plans* as "all or nothing" because, in exchange for the ability to avoid early termination fees, participants must agree a minimum commitment level defined as a percentage of all DS1 purchases from AT&T at

[23] This is true whether portability is purchased separately from the underlying term discounts or bundled with them in term-plus-portability plans. For example, AT&T explicitly permits customers in the Ameritech region to place some circuits in a term-plus-portability plan (the DCP) and other circuits in a term-only plan with slightly higher term discounts (the OPP). *See* Reid Decl. ¶ 14. The *Tariff Order* noted that that, unlike the other AT&T portability plans, the Ameritech term-plus-portability plan "requires that, at the inception of the plan, a customer purchase all of its DS1s from [that plan]." *Tariff Order* ¶ 98. But the moment a customer opts into that plan, it may immediately "move circuits or make purchases out of other non-portability discount plans and receive corresponding reductions in … commitment levels[.]" *Id.* ¶ 98 n.248; *see* Reid Decl. ¶ 14.

the beginning of the portability plan's term. *Id.* ¶ 96. In other words, the *Tariff Order* found that these are "all-or-nothing" plans because they "prevent the customer from keeping any of its [DS1] purchases . . . out of the calculation of the initial … commitment required by the plan." *Id.* ¶ 103. And the *Order* concluded that all such plans should be prohibited on the ground that they inherently present greater "lock-in" (foreclosure) risks than other types of percentage commitments. *See id.* ¶¶ 95-96.

That rule makes no sense. In categorically denouncing any portability plan that "prevent[s] the customer from keeping any of its [DS1] purchases . . . out of the calculation of the initial … [percentage] commitment," *id.* ¶ 103, the *Tariff Order* addressed only the denominator in any percentage commitment: the number of circuits that a customer begins with when it enters into the portability plan. And it ignored the numerator: the number of circuits a customer keeps in service. The *Tariff Order* thus irrationally prohibited "all-or-nothing" plans no matter what their percentage commitments and no matter what market conditions they apply in—and thus no matter how competitively reasonable they are.[24] Again, under *BellSouth*, the Commission has no basis for invalidating *any* optional pricing plan that allows competitors, at their discretion, to obtain more favorable terms than they could obtain under standard tariff provisions deemed "just and reasonable" and thus lawful under sections 201-205. But in all events the Commission should not assign irrational significance to the "all or nothing" characteristics of the commitments used as the *quid pro quo* for such benefits.

[24] For example, the *Tariff Order* invalidated the Ameritech and PacBell/Southwestern Bell tariffs even though a customer needed to maintain, respectively, only 80% and 90% commitment levels, and the *Order*'s logic would have invalidated those tariffs even if the levels had been set at 50% or 10%. In contrast, the *Order* left the BellSouth portability plan intact because the BellSouth tariff calculates the denominator on the basis of whatever circuits a customer chooses to place in the portability plan. *See* Reid Decl. ¶¶ 15, 12 n.6. But the BellSouth tariff also sets the numerator at the same level, effectively imposing a 100% commitment level. *Id.*

Subsequent experience with the Commission's "remedies" confirm the misguided nature of the Commission's focus on the "all-or-nothing" feature of these plans. After holding that three of AT&T's portability plans were unlawful, the Commission pressured AT&T to file new tariffs that permitted customers to select which DS1 circuits they wished to place into the portability plan, as the BellSouth plan does. Over a year later, however, only *one* of AT&T's portability plan customers has enrolled in a new portability plan under any of AT&T's Commission-designed replacement tariffs. This experience shows that most CLEC customers, including the major carriers that agitated for this tariff investigation, were in fact perfectly content to keep their putatively "unlawful" all-or-nothing portability plans. That is because AT&T's original plans, which were introduced at the behest of its customers, provided more favorable terms than those required by the Commission's unnecessary intervention in this functioning competitive marketplace.

CONCLUSION

The Commission should reverse the *Tariff Order* in relevant part and dismiss the underlying complaints with prejudice.

Respectfully submitted,

/s/ James P. Young

James P. Young
Christopher T. Shenk
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005
(202) 736-8000
(202) 736-8711 (fax)

Keith M. Krom
Gary L. Phillips
David L. Lawson
AT&T Services, Inc.
1120 20th Street, NW,
Suite 1000
Washington, DC 20016
(202) 463-4148

Dated: December 4, 2017

Counsel for AT&T Services, Inc.